

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
JONESBORO DIVISION

MARGARET McILLWAIN

PLAINTIFF

V.

NO. 3:01CV00045 SMR

BANK OF HARRISBURG, ARKANSAS

DEFENDANT

**ORDER**

Pending before this Court are two motions: (1) Plaintiff's Motion To Set Aside (Doc. No. 9) concerning this Court's order of July 2, 2001 (Doc. No. 8), which set a deadline of July 6, 2001, for Plaintiff's response to Defendant's motion for summary judgment, and (2) Defendant's Motion for Summary Judgment (Doc. No. 3), filed on May 15, 2001, to which Plaintiff has not responded.

I.

Plaintiff has repeatedly missed her deadline to file a response to Defendant's motion for summary judgment, yet, once again asks for another extension of time. This Court is of the opinion that such an extension would only lead to further delay because the law is utterly devoid of any case or statute which would provide Plaintiff with a basis to proceed. Therefore, Plaintiff's Motion To Set Aside is DENIED.

II.

Defendant asserts two grounds for summary judgment in its motion: the passing of the statute of limitation and res judicata.

The statute of limitation on Plaintiff's cause of action has clearly passed. Two possible causes of action can be divined from Plaintiff's complaint: the unlawful taking of property

without just compensation and fraud and deceit.

Plaintiff states that the foreclosure by Defendant constitutes an unlawful taking of property without just compensation in violation of the “Fourth and Fifteenth Amendments.” As this Court is unaware of any action taken by Defendant which denied or abridged Plaintiff’s Fifteenth Amendment guaranteed right to vote, this Court will assume that Plaintiff intended to proceed under the Fourteenth Amendment incorporation doctrine.

Even assuming that Plaintiff intended to proceed under the Fourth and Fourteenth Amendments, Defendant is a privately owned bank. The provisions of the Constitution apply only to government action. Thus, Plaintiff cannot proceed against Defendant under an unlawful takings claim.

Plaintiff’s unlawful taking claim is even more frivolous when the fact that Plaintiff waited fourteen years to file it is considered. In Arkansas, the applicable statute of limitations is seven years. *See* Ark. Code Ann. § 18-61-101; *Roy v. City of Little Rock*, 902 F. Supp. 871, 877 n.10 (E.D. Ark. 1995). The property in question was sold in 1985. Plaintiff did not file this cause of action until March 3, 1999, almost fourteen years after Plaintiff’s alleged cause of action accrued. Plaintiff’s claim of unlawful taking is time barred.

Plaintiff’s complaint also alleges a cause of action for fraud and deceit. In Arkansas, the statute of limitation for fraud is three years. *See Gibson v. Herring*, 975 S.W.2d 860, 862 (Ark. Ct. App. 1998). As mentioned above, Plaintiff waited fourteen years to file her claim. Plaintiff’s claim of fraud is barred. Furthermore, regardless of Plaintiff’s theory of recovery, this Court is aware of no cause of action with a fourteen year statute of limitation.

Plaintiff’s claim is also precluded by res judicata. A claim is barred by res judicata when “(1) the first suit resulted in a final judgment on the merits; (2) the first suit was based upon

proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action.” *See Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8<sup>th</sup> Cir. 1998).

The first suit resulted in a final judgment on the merits. The original foreclosure action, *Bank of Harrisburg v. McIllwain*, No. E-83-313 (Poinsett County Chancery Court 1985), resulted in a final judgment on the merits on both the issue of foreclosure and on Plaintiff’s claims of damages. Furthermore, Plaintiff’s appeal was even heard by the Arkansas Court of Appeals, *McIllwain v. Bank of Harrisburg*, 18 Ark. App. 213, 713 S.W.2d 469 (1986). A final judgment on the merits was reached.

The first suit was based upon proper jurisdiction. The original suit was a foreclosure suit concerning real property in Arkansas brought in an Arkansas chancery court. Chancery courts have subject matter jurisdiction over foreclosure actions. *See Burns v. First Nat’l Bank*, 985 S.W.2d 747, 748 (Ark. 1999). Furthermore, both plaintiff and defendant in this action were Arkansas citizens and the real property in question was in Arkansas, so the chancery court enjoyed personal jurisdiction over both of the parties and in rem jurisdiction over the property.

Both suits involve the same parties. In both cases, the plaintiff, Margaret McIllwain, brought suit against the defendant, Bank of Harrisburg. This element is clearly satisfied.

Both suits are based upon the same claim or cause of action. The party against whom res judicata is sought must have had a full and fair opportunity to litigate the matter in the prior law suit. *See Costner*, 153 F.3d at 673. However, res judicata bars relitigation of claims that were actually litigated in the first suit as well as those claims that could have been litigated. *See Pace Indus. v. NLRB*, 118 F.3d 585, 589 (8<sup>th</sup> Cir. 1997).

Both lawsuits involve property owned by Plaintiff and her husband which Plaintiff and her husband mortgaged on August 14, 1979, as security for a Promissory Note to Defendant

which was executed on August 14, 1979, in the amount of \$294,868.04. Both lawsuits involve claims for the right to the property in question. The issue of whether the promissory note executed by Dana Collins constituted payment of Plaintiff's Promissory Note thus releasing Plaintiff of her obligation to Defendant was litigated in the prior suit.

Plaintiff was represented by counsel in the previous suit, and a reading of Plaintiff's Complaint in this case demonstrates that all of the arguments made by Plaintiff were addressed in the previous lawsuit. Plaintiff filed a Counterclaim and Cross-Complaint in the previous suit setting out her rights to the property in question. The previous suit was then appealed to the Arkansas Court of Appeals which gave Plaintiff partial relief. Furthermore, even if Plaintiff can show there were issues not litigated, there are no issues being raised currently that could not have been raised in the prior lawsuit. Both suits are based on the same cause of action, and, therefore, Plaintiff's claims are barred by res judicata.

Plaintiff also makes a vague reference to a 28 U.S.C. § 1343 claim. However, even a generous reading of the balance of the Complaint does not reveal Plaintiff's theory of this claim. Given the liberal pleading rules of the Federal Court System and this Court's generous acquiescence to Plaintiff's repeated requests for more time, this Court is left with no choice but to consider the mention of 28 U.S.C. § 1343 (along with the reference to the Constitution) as Plaintiff's meritless attempt to give this Court jurisdiction under 28 U.S.C. § 1331, i.e., federal question jurisdiction.

Based on the analysis above, Defendant's Motion For Summary Judgment should be granted.

### III.

This Court is of the opinion that this Complaint violates Rule 11 of the Federal Rules of Civil Procedure. It is based on a cause of action that allegedly accrued almost fourteen years ago—well over any statutory limitation period. It has also already been litigated in a previous suit and an appeal and, therefore, is barred by *res judicata*. Furthermore, Plaintiff alleges that Defendant, a private citizen of Arkansas, has violated the Constitution. With very limited exceptions, the Constitution applies only to government action, and no such exception even remotely applies here. This Court is of the opinion that this Complaint is frivolous and filed only with the hope that its nuisance value would lead to a settlement. This Court is also of the opinion that Plaintiff can assert no good faith basis for extension of any existing law that would save this Complaint, as evidenced by Plaintiff's repeated failures to respond to Defendant's Motion For Summary Judgment.

Therefore, Plaintiff and her attorney are ORDERED to show cause within ten (10) days of the entry of this order why sanctions pursuant to Federal Rule of Civil Procedure 11(c) should not be imposed against each of them. Plaintiff's Motion To Set Aside (Doc. No. 9) is DENIED. Defendant's Motion For Summary Judgment (Doc. No. 3) is GRANTED and this suit is DISMISSED WITH PREJUDICE. A separate judgment will be entered this date.

IT IS SO ORDERED this \_\_\_\_\_ day of August, 2001.

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UNITED STATES DISTRICT JUDGE

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DEFENDANT

**JUDGMENT**

Pursuant to an Order in this matter this date, it is Considered, Ordered and Adjudged that this case be, and it hereby is, dismissed with prejudice. The Court retains jurisdiction for ninety (90) days to determine the issue of sanctions.

DATED this \_\_\_\_\_ day of August, 2001.

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UNITED STATES DISTRICT JUDGE